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INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Nature of the case	2
Statutory provisions sustaining jurisdiction	2
Statute of the State the validity of which is involved	3
Date of the decrees sought to be reviewed and date of the application for appeal	18
Rulings below	19
Cases believed to sustain the jurisdiction	19
Appendix "A"—(Opinion on application for permanent injunction)	21
Appendix "B"—(Opinion on application for interlocutory injunction in the case of Texas Panhandle Gas Company v. Thompson et al.)	44
Appendix "C"—(Opinion on application for interlocutory injunction in the case of Texoma Natural Gas Co. v. Thompson et al.)	54

Table of Cases Cited.

Champlin Refining Co. v. Oklahoma Corporation Commission, 286 U. S. 210, 52 Sup. Ct. Rep. 559, 76 L. Ed. 1062	19
Clark v. Poor, 274 U. S. 554, 47 Sup. Ct. Rep. 702, 71 L. Ed. 1199	19
Hays v. Port of Seattle, 251 U. S. 233, 40 Sup. Ct. Rep. 125, 64 L. Ed. 243	20
Jackson v. Cravens, 238 Fed. 117	20
Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. Rep. 715, 56 L. Ed. 1182	20
Stratton v. St. Louis, S. W. Ry. Co., 282 U. S. 10, 51 Sup. Ct. Rep. 8, 75 L. Ed. 71	19, 20

Statutes Cited.

Acts of Texas Legislature of 1935, Chapter 120, 44th Legislature, p. 318, Regular Session; Article 6008, Title 102, Vernon's Annotated Texas Statutes, Revision of 1925 (Volume I, page 318, General and Special Laws of the State of Texas passed by the Forty-fourth Legislature at the Regular Session), Section 1	3
2	4
2a	4
2b	4
2c	4
2d	4
2e	4

Page

Acts of Texas Legislature of 1935, Chapter 120, 44th Legislature, p. 318, Regular Session; Article 6008, Title 102, Vernon's Annotated Texas Statutes, Revision of 1925 (Volume I, page 318, General and Special Laws of the State of Texas passed by the Forty-fourth Legislature at the Regular Session), Section 2f..... 5
2g 5
2h 5
2i 5
2j 5
2k 5
3 5
3a 6
3b 6
3c 6
3d 6
3e 6
3f 6
3g 6
3h 6
3i 6
3j 6
3k 6
3l 6
3m 7
4a 7
4b 7
5 7
6 7
6(1) 8
6(2) 8
6(3) 8
6(4) 8
6(5) 8
6(6) 8
6(7) 8
7 8
7(1a) 8
7(1b) 8
7(1c) 9
7(1d) 9
7(2) 9
7(3) 9
7(4) 9
8 9
9 10
10 10
10a 10
10b 11
11 11

Page

Acts of Texas Legislature of 1935, Chapter 120, 44th Legislature, p. 318, Regular Session; Article 6008, Title 102, Vernon's Annotated Texas Statutes, Revision of 1925 (Volume I, page 318, General and Special Laws of the State of Texas passed by the Forty-fourth Legislature at the Regular Session), Section 12 11
13 12
14 12
15 13
16 14
17 14
18 14
19 15
20 15
21 16
22 16
23 16
24 17
25 17
26 18
27 18

Constitution of the United States, 14th Amendment 19
Judicial Code, Section 238, as amended (28 U. S. C. A. 345) 3
266, as amended (28 U. S. C. A. 380) 2

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

EQUITY. NO. 539.

CONSOLIDATED GAS UTILITIES CORPORATION,
Complainant;

vs.

ERNEST O. THOMPSON ET AL.,
Defendants.

EQUITY. NO. 550.

TEXOMA NATURAL GAS COMPANY,
Complainant,

vs.

ERNEST O. THOMPSON ET AL.,
Defendants.

STATEMENT DISCLOSING BASIS OF JURISDICTION OF THE SUPREME COURT UNDER SUPREME COURT RULE NO. 12, AS AMENDED.

Now come Ernest O. Thompson, Lon A. Smith and C. V. Terrell, composing the Railroad Commission of Texas, and William McCraw, Attorney General of Texas, the

defendants in the above-entitled causes, same having been consolidated for the purposes of appeal, and submit and file this, their statement, particularly disclosing the basis upon which it is contended that the Supreme Court has jurisdiction upon appeal to review the decrees rendered in these causes:

I.

These suits, which have been consolidated for the purposes of appeal, were instituted to secure interlocutory and permanent injunctions against the enforcement of certain orders promulgated by the Railroad Commission of Texas, an administrative body of the State of Texas, it being alleged that such orders and the statute under which they were promulgated violated complainants' rights under the Fourteenth Amendment to the United States Constitution. That in accordance with the provisions of Judicial Code, Section 266 as amended, a three-judge court was convened, which court heard and granted complainants' applications for interlocutory and permanent injunctions enjoining the enforcement of said orders of the Railroad Commission of Texas, as prayed for by complainants.

II.

The statutes believed to sustain the jurisdiction of the Supreme Court to review the judgments or decrees in question are (a) Judicial Code, Section 266 as amended (Title 28, Section 380, U. S. C. A.), which section specifically provides in part as follows:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case * * * and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such

suit." (b) Judicial Code, Section 238 as amended (Title 28, Section 345, U. S. C. A.), which provides in part as follows: "A direct review by the Supreme Court of the interlocutory or the final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise: * * * (3) Section 380 of this title."

III.

The statute of the State of Texas, the validity of which is involved, is Chapter 120, Acts 1935, 44th Legislature, p. 318, Regular Session; Article 6008, Title 102, Vernon's Annotated Texas Statutes, Revision of 1925 (commonly referred to as House Bill 266). Said statute may be found in Volume I, page 318, General and Special Laws of the State of Texas passed by the Forty-fourth Legislature at the Regular Session. (Convened January 8, 1935, adjourned May 11, 1935.) The provisions of said statute are as follows:

BE IT ENACTED BY THE LEGISLATURE OF THE STATES OF TEXAS:

SECTION 1. Declaration of Policy—In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production.

Article 6008 of the Revised Civil Statutes of Texas of 1925 as amended by Chapter 26, Acts of the First Called Session of the Forty-second Legislature, as amended by Chapter 100, Acts of the Regular Session of the Forty-third Legislature, as amended by Chapter 88, Acts of the

First Called Session of the Forty-third Legislature, is hereby amended so as to hereafter read as follows:

SEC. 2. Unless the context otherwise requires, the words defined in this Section shall have the following meaning when used in this Article to wit:

(a) "Commission" means the Railroad Commission of Texas;

(b) "Person" means any natural person, corporation, association, partnership, receiver, trustee, guardian, executor, administrator and a fiduciary or representative of any kind;

(c) The term "Common Reservoir" as used in this Article shall mean any oil and/or gas field or part thereof which comprises and includes any area which is underlaid, or which from geological or other scientific data or experiments or from drilling operations or other evidence appears to be underlaid by a common pool or accumulation of oil and/or gas;

(d) The term "gas well" is any well (a) which produces natural gas not associated or blended with crude petroleum oil at the time of production, or (b) which produces more than one hundred thousand (100,000) cubic feet of natural gas to each barrel of crude petroleum oil from the same producing horizon, or (c) which produces natural gas from a formation or producing horizon productive of gas only encountered in a well bore through which crude petroleum oil also is produced through the inside of another string of casing.

(e) The term "oil well" is any well which produces one (1) barrel or more of crude petroleum oil to each one hundred thousand (100,000) cubic feet of natural gas.

(f) "Dry Gas" is any natural gas produced from a stratum that does not produce crude petroleum oil.

(g) The term "sour gas" shall mean any natural gas containing more than one and one-half (1½) grains of hydrogen sulphide per one hundred (100) cubic feet or more than thirty (30) grains of total sulphur per one hundred (100) cubic feet, or gas which in its natural state is found by the Commission to be unfit for use in generating light or fuel for domestic purposes.

(h) The term "sweet gas" shall mean all natural gas except "sour gas" and "casinghead gas."

(i) The term "casinghead gas" shall mean any gas and/or vapor indigenous to an oil stratum and produced from such stratum with oil.

(j) The term "natural gasoline" shall apply to gasoline manufactured from casinghead gas or from any natural gas.

(k) For the purposes of this Article, by the term "cubic foot of gas" is meant volume of gas expressed in cubic feet and computed at a base pressure of four (4) ounces per square inch above the average barometric pressure of 14.4 pounds per square inch, a standard base and flowing temperature of sixty (60) degrees Fahrenheit; correction to be made for pressure according to Boyle's Law, and for specific gravity according to test made by the Balance Method.

SEC. 3. The production, transportation, or use of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term "waste" among other things shall specifically include:

(a) The operation of any oil well, or wells with an inefficient gas-oil ratio.

(b) The drowning with water of any stratum or part thereof capable of producing gas in paying quantities.

(c) Underground waste or loss however caused and whether or not defined in other subdivisions hereof.

(d) Permitting any natural gas well to burn wastefully.

(e) The creation of unnecessary fire hazards.

(f) Physical waste or loss incident to, or resulting from, so drilling, equipping, or operating well or wells as to reduce or tend to reduce the ultimate recovery of natural gas from any pool.

(g) The escape into the open air, from a well producing both oil and gas, of natural gas in excess of the amount which is necessary in the efficient drilling or operation of the well.

(h) The production of natural gas in excess of transportation or market facilities, or reasonable market demand for the type of gas produced.

(i) The use of natural gas for the manufacture of carbon black without first having extracted the natural gasoline content from such gas.

(j) The use of sweet gas produced from a gas well for the manufacture of carbon black.

(k) Permitting any natural gas produced from a gas well to escape into the air before or after such gas has been processed for its gasoline content.

(l) The production of natural gas from a well producing oil from a stratum other than that in which the oil is

found, unless such gas is produced in a separate string of casing from that in which the oil is produced.

(m) The production of more than one hundred thousand (100,000) cubic feet of gas to each barrel of crude petroleum oil unless such gas is put to one or more of the uses authorized for the type of such gas so produced under allocations made by the Commission.

SEC. 4. (a) If oil and/or gas be produced through different strings of casing set in the same well bore, the inner string through which oil and/or gas be produced shall be regarded as one well, and each successive additional string of casing through which oil and/or gas shall be produced, from a different producing horizon, the others producing through the same well bore, shall be regarded as another well.

(b) No person in possession of or operating any oil well shall produce from such well natural gas found in a horizon productive of natural gas only.

SEC. 5. The Commission is given authority to fix and determine the gas-oil ratio of all oil wells in this State, but nothing in this Act shall be construed to authorize the limitation of the production of marginal wells, as such marginal wells are defined, below the amount fixed by statute. If any restriction imposed by the Commission upon the production of oil from any oil well operates to increase the gas-oil ratio of such well so as to then classify it as a gas well under the provisions of this Article, such well shall be deemed to be an oil well nevertheless.

SEC. 6. The Commission shall make and enforce rules, regulations, or orders for the conservation of natural gas, to prevent the waste thereof, and otherwise to accomplish

the purposes of this Article, including rules, regulations, or orders for the following purposes:

(1) To prevent the waste, as hereinbefore defined, of natural gas in drilling and producing operations and in the piping and distribution thereof.

(2) To require dry or abandoned wells to be plugged in such way as to confine natural gas, and water in the strata in which they are found and to prevent them from escaping into other strata.

(3) For the drilling of wells and preserving a record thereof.

(4) To require wells to be drilled and operated in such manner as to prevent injury to adjoining porperty.

(5) To prevent natural gas and water from escaping from the strata in which they are found into other strata.

(6) To require records to be kept and reports made.

(7) To provide for the issuance of permits, and other evidences of permission when the issuance of such permits, or permission is necessary or incident to the enforcement of its blanket grant of authority, to make any rules necessary to effectuate the law.

SEC. 7. After the expiration of ten (10) days from the time of encountering gas in a gas well, no gas from such well shall be permitted to escape into the air, and all gas produced therefrom shall be utilized for the following purposes:

(1) No sweet gas shall be utilized except for:

(a) Light or fuel.

(b) Efficient chemical manufacturing, other than the manufacture of carbon black.

(c) Bona fide introduction of gas into oil, or gas bearing horizon, in order to maintain or increase the rock pressure or otherwise increase the ultimate recovery of oil or gas from such horizon.

(d) The extraction of natural gasoline therefrom when the residue is returned to the horizon from which it is produced.

(2) In addition to the purposes for which sweet gas produced from a gas well may be used, sour gas may be used for efficient chemical manufacturing purposes including the manufacture of carbon black provided it is utilized in a plant producing a recovery of not less than one (1) pound of carbon black to each One thousand cubic feet of gas, and provided further that the gasoline content is removed and saved from such sour gas before the same is utilized for carbon black.

(3) Casinghead gas may be used for any beneficial purpose, which includes the manufacture of natural gasoline.

(4) Any producer of either sweet or sour gas or casinghead gas may use the same as gas lift in the bona fide production of oil where such gas is not used in excess of ten thousand (10,000) cubic feet per barrel of oil produced; provided that in order to prevent waste in any case where the facts in such case warrant it, the Commission may permit the use of additional quantities of gas to lift oil, provided all such gas so used in excess of ten thousand (10,000) cubic feet for each barrel of oil shall be processed for natural gasoline and the residue burned for carbon black when same is reproduced.

SEC. 8. It shall be the duty of all persons, companies or corporations producing natural gas from any gas well to ascertain and determine during the months of January,

and July, respectively, of each year hereafter, through appropriate tests, to be made in the presence of and under the supervision of a representative of the Commission, and under uniform and generally recognized methods, and under regulations which shall be prescribed by the Commission, the open flow and rock pressure of each gas well from which natural gas shall be produced, and verified reports thereof shall be filed with the Commission on or before the tenth day of each of the months aforesaid; which said reports shall be kept on file with the Commission and shall become a permanent public record and shall be open to the inspection and examination of the public, and which said reports shall disclose the name of the representative of the Commission who was actually present when such tests were made. If any person producing gas from the same common reservoir be dissatisfied with the test as made and reported, such person may demand a second test to be made in the manner herein provided and in the presence of such person or his representative.

SEC. 9. The Railroad Commission shall require one of its duly authorized agents to inspect, read or test any meter, or meters, through which natural gas is being measured, or gauged, upon the request of any lessor, lessee, operator, or royalty owner from whose land, lease, or royalty interest natural gas is being produced.

SEC. 10. It shall be the duty of the Commission to prorate and regulate the daily gas well production from each common reservoir in the manner and method herein set forth. The Commission shall prorate and regulate such production for the protection of public and private interests:

(a) In the prevention of waste as "waste" is defined herein;

(b) In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this Article.

SEC. 11. The Commission shall exercise the authority to accomplish the purpose designated under item (a) of Section 10 when the presence or imminence of waste is supported by a finding based upon the evidence at a hearing to be held as herein provided.

The Commission shall exercise the authority to accomplish the purpose designated under item (b) of Section 10 when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission that the aggregate lawful volume of the open flow or daily potential capacity to produce of all gas wells located in a common reservoir, is in excess of the daily reasonable market demand for gas from gas wells that may be produced from such common reservoir, to be utilized as permitted in this Article.

SEC. 12. On or before the twentieth (20th) day of each calendar month the Commission shall hold a hearing after notice has been given, as provided by law, for the purpose of determining the aggregate daily capacity to produce of all gas wells in a common reservoir, and as nearly as possible, the daily volume of gas from each common reservoir that will be produced from gas wells during the following month to be utilized as permitted in this Article. Upon such determination, the Commission, based upon evidence introduced at such hearing, shall allocate to each gas well producing gas from such common reservoir a percentage of the daily productive capacity of each well which may be produced daily during the following month from each gas well producing gas from such common reservoir. Such percentage of the daily producing capacity of each well

shall be regarded as its daily allowable production of such daily volume required for utilization from such common reservoir. The daily allowable production of each gas well shall be computed and allocated as provided in Section 13 and 14.

SEC. 13. In determining the daily allowable production for each gas well the Commission shall take into account the size of the tract segregated with respect to surface position and common ownership upon which such gas well or wells are located; the relation between the daily producing capacity of each gas well and the aggregate daily capacity of all gas wells producing the same kind of gas in the same common reservoir or zone; and all other factors which are pertinent; provided that the Commission shall not take into account the size of the tract upon which any gas well or wells are located in excess of the efficient drainage area of such well or wells, producing at twenty-five per cent (25%) of the daily productive capacity, which drainage area shall be determined by the Commission. In ascertaining the drainage area of a well, the Commission shall take into account such factors as are reflected in the productive capacity of a gas well, including formation pressure, the permeability and porosity of the producing formation, and the well bore's structural position, together with all other factors taken into account by a reasonably prudent operator in determining the drainage area for a gas well.

SEC. 14. It shall be the duty of the Commission, after notice and hearing, to ascertain and determine the reasonable market demand for gas from gas wells to be used for light and fuel purposes and for all other lawful purposes to which sweet gas may be put under the terms of this Article and by proper order to restrict the production of gas from all gas wells in said field producing such gas to an

amount equal to market demand or to an amount which may be produced without waste as otherwise defined; provided, however, the production of such gas shall in any event be restricted to the amount of the reasonable market demand therefor. In such order the Commission shall allocate, distribute or apportion the total allowable production from such field among the various gas wells affected by the order on a reasonable basis, and as provided in Section 13. It shall likewise by the duty of the Commission to prorate the daily gas well production of sour gas produced from each common reservoir of sour gas in this State. The hearing for such purpose shall be held at the same time as the hearing pertaining to the proration of sweet gas well production. The proration of sour gas well production shall be accomplished according to the manner and method herein provided for the proration of sweet gas well production.

SEC. 15. Nothing contained in this Article shall require that the production from any gas well with a daily natural open flow of two hundred thousand (200,000) cubic feet of natural gas or more to be restricted to a quantity less than fifty thousand (50,000) cubic feet of natural gas daily; and nothing herein shall require that the production from any gas well with a daily natural open flow of less than two hundred thousand (200,000) cubic feet of gas be reduced to a quantity less than twenty-five per cent (25%) of its natural open flow.

In all comon reservoirs producing both sweet and sour gas, no gas well shall be permitted to produce in excess of twenty-five per cent (25%) of its daily productive capacity; provided the Commission, upon a finding that reservoir conditions require that such percentage be increased to prevent waste, and that such increase will not create a drainage condition as between sweet and sour gas lands,

may authorize an increase in such allowable production. Where the allowable production theretofore allocated to any well is more than fifteen per cent (15%) of its daily producing capacity, and the Commission finds that the production of its daily allowable from such well will cause waste due to the intermingling of sweet and sour gas, the Commission may order the production from such well restricted to fifteen per cent (15%) of its daily producing capacity, but this sentence shall not be construed to militate against the right of the Commission to fix the allowable production of any well below fifteen per cent (15%) of its daily producing capacity in carrying out the requirements of Sections 13 and 14 of this Act.

SEC. 16. It shall be unlawful for any person to produce gas from a gas well as herein defined in excess of the daily allowable production in such schedule of allowable production. The rate of production from any gas well shall be deemed to be the average daily rate of production for the month.

SEC. 17. Where gas is produced from one stratum and oil and gas is produced from another stratum in the same well bore, the Commission shall take into account the amount of gas produced from the oil stratum in determining the amount of gas that may be produced from the stratum producing gas only and may subtract the amount of the casinghead gas produced from the dry gas that would be allocated to said well if it produced dry gas and may restrict the dry gas production accordingly.

SEC. 18. When unforeseen contingencies increase the demand for gas required by any distributor, transporter or purchaser to an amount in excess of the total allowable production of the wells to which he is connected, such distributor, transporter or purchaser is authorized to increase

his take ratably from all such wells in order to supply his demand for gas, provided, however, that notice of such increase and the amount thereof shall be given to the Commission within five (5) days; and provided further that the Commission, at its next hearing, shall adjust the inequality of withdrawals caused by such increase in fixing the allowable production of the various wells in the common reservoir or zone.

SEC. 19. If the Commission finds upon consideration of the evidence introduced at a hearing that either or both of the purposes designated under Section 10 of this Article may be more adequately accomplished by zoning a common reservoir, the Commission shall zone such common reservoir. If the Commission zones such common reservoir, each zone shall be regarded as a separate common reservoir in making allocations of daily allowable production as provided in this Article. The Commission shall allocate to each zone its just proportion of the market demand for gas from the common reservoir, and shall establish appropriate rules and regulations applicable to each zone and shall have the right to adjust its orders to the practicable conditions which exist and to enter any reasonable order which is necessary to effectuate the purpose of this law. The Commission is expressly authorized to segregate a sour gas area from a sweet gas area and shall not be required to restrict the allowable production of the sour gas zone to the same percentages that may be produced from the sweet gas zone.

SEC. 20. In the event the Commission finds that the owner of any gas well has failed or refused to utilize or sell the allowable production from his well when such owner has been offered a connection or market for such gas at a reasonable price, such well shall be excluded from consideration in allocating the daily allowable production from the reser-

voir or zone in which same is located until the owner thereof signifies to the Commission his desire to utilize or sell such gas. In all other cases all gas wells shall be taken into account in allocating the allowable production among wells producing the same type of gas.

SEC. 21. In order that land owners and operators that have undeveloped land within a proven natural gas field may secure a market for their natural gas, and in order that the market for natural gas may be more equitably distributed among the various land owners and operators, and in the interest of the conservation and development of natural gas, it is declared to be lawful for any two or more lessors, lessees, operators, or other persons, firms, or corporations owning or controlling production, leases, royalties or other interests in the separate properties of the same producing gas field, with the approval of the Attorney General of Texas, to enter into agreements for the purpose of bringing about cooperative development and/or operation of all or a part, or parts of such field, or for the purpose of fixing the time, location and manner of drilling and operating wells for the production, storage, marketing or the repressuring of gas, or for the purpose of the equitable distribution of royalty payments. Any such agreement shall bind only the parties thereto, and their successors and assigns of such having knowledge or notice thereof, and shall be enforceable in an action for specific performance.

SEC. 22. The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all rules, regulations or orders which it finds are necessary to effectuate the provisions and purpose of said law.

SEC. 23. Any person violating any of the provisions of this Article shall be liable to a penalty not to exceed One

Thousand Dollars ($1,000) for each offense, and each day's violation shall be a separate offense. Such penalty may be recovered by the State of Texas with the cost of suit in a civil action instituted in Travis County or in the County where the violation occurred by the Attorney General or by the County or District Attorney when joined by the Attorney General of Texas; and any and all violations or threatened violations of this Article may be enjoined by any Court of competent jurisdiction in which the suit for penalty may be brought, and in such cases the Court may issue such writs of injunction, mandatory or prohibitory, as the facts justify.

SEC. 24. Any person may appeal for judicial review from any rule, order, or regulation of the Commission made and promulgated under the authority conferred by this Article, in the same manner, upon the same conditions and to the same court or courts as prescribed in this Chapter for appeals from other rules, regulations or orders of the Commission, promulgated under the general Oil Conservation Statutes of this State.

SEC. 25. All laws or parts of laws in conflict with any of the provisions of this Act are hereby expressly repealed; provided that on account of the absence of pipe lines necessary to accomplish transportation of gas to carbon black plants from many areas producing sour gas in one or more of the common reservoirs of this State and in as much as many wells producing sweet gas are without market outlet for gas used as light and fuel which will require considerable time to make connection after hearing to determine the allowable production, it is provided that gas from a well producing sour gas only may be utilized as provided in said Article 6008 of the Revised Civil Statutes of 1925 as amended by Acts of the First Called Session of the Forty-second Legislature, as amended by Acts of the Reg-

ular Session of the Forty-third Legislature as aforesaid, until October 1, 1935, and the gas from a well producing sweet gas may be utilized as authorized under said Act as amended until August 1, 1935, at which time this Article shall be effective as to sweet gas wells; provided, however, that nothing in this Act contained shall repeal, modify or impair any of the provisions of House Bill No. 782, relating to oil and gas conservation, enacted at this session of the Legislature, or shall impair the power of the Commission, proceeding under the oil and gas conservation laws of this State, to prevent waste.

SEC. 26. If any section or sections, clause, sentence or provision of this Article should, for any reason, be held to be invalid or unconstitutional, it shall not affect in anywise the remaining parts of this Article, not so held, and all that portion not held invalid shall remain in full force and effect.

SEC. 27. The presence and imminence of evils occurring in the production and use of natural gas as a result of the waste in the production and use thereof in the absence of correlative opportunities of owners of gas in the common reservoirs of this State to produce and use the same, have created an emergency and imperative public necessity demanding the suspension of the Constitutional Rule requiring Bills to be read on three separate days in each House, and said Rule is hereby suspended, and this Act shall take effect from and after its passage, and it is so enacted.

IV.

The judgments and decrees sought to be reviewed were entered on the 26th day of April, 1936, and the 30th day of April, 1936, respectively. The application for appeal was presented and allowed on the 8th day of May, 1936.

V.

These causes alike concern the constitutionality as to the complainants of the provisions of the statutes of the State of Texas herein set out and the orders of the Railroad Commission of Texas adopted pursuant thereto. Said orders undertake to restrict the production of gas from gas wells in the Panhandle gas field of Texas, in which field each of said complainants owns producing gas wells. In their bills of complaint each of complainants alleged that the allowable allocated to their gas wells by such orders of the Railroad Commission was insufficient to supply the market requirements which complainants had for gas from such wells, and that by undertaking to restrict the production of gas from such wells below such market requirements, such orders and the statute under which they were promulgated operated to deprive complainants of their rights under the Fourteenth Amendment to the United States Constitution.

The cases were heard together and the ruling of the court was that the operation of such orders resulted in depriving complainants of their property without due process of law and the taking of their property without compensation, in violation of their rights under the Fourteenth Amendment to the United States Constitution, and the decrees of the court granted to complaints permanent injunctions against the enforcement and execution of the orders and the portions of the statute in pursuance of which such orders were issued.

VI.

The cases believed to sustain the jurisdiction of the Supreme Court are *Champlin Refining Co.* v. *Oklahoma Corporation Commission,* 286 U. S. 210, 52 S. Ct. 559, 76 L. Ed. 1062; *Clark* v. *Poor,* 274 U. S. 554, 47 S. Ct. 702, 71 L. Ed. 1199; *Stratton* v. *St. Louis, S. W. Ry. Co.,* 282 U. S. 10,

51 S. Ct. 8, 75 L. Ed. 71; *Hays* v. *Port of Seattle*, 251 U. S. 233, 40 S. Ct. 125, 64 L. Ed. 243; *Savage* v. *Jones*, 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182; *Jackson* v. *Cravens*, 238 Fed. 117.

There is appended to this statement copies of the opinions of the trial court granting to complainants interlocutory injunctions and the opinion granting complainants' prayers for permanent injunctions. The opinion of the trial court on the application for interlocutory injunction in cause No. 539 in Equity is reported in 12 Fed. Supp. 462.

Respectfully submitted,

(Signed) WM. MCCRAW,
Attorney General of Texas;
" W. J. HOLT,
Assistant Attorney General;
" WM. MADDEN HILL,
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" C. C. SMALL,
Amarillo, Texas;
" MAURICE CHEEK,
Ft. Worth, Texas,
Attorneys for Defendants, Ernest O. Thompson, Lon A. Smith and C. V. Terrell, composing the Railroad Commission of Texas, and William McCraw, Attorney General of Texas.

APPENDIX "A".

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS.

EQUITY. No. 539.

CONSOLIDATED GAS UTILITIES CORPORATION, *Complainants,*

versus

ERNEST O. THOMPSON, *et al., Defendants.*

EQUITY, No. 550.

TEXOMA NATURAL GAS COMPANY, *Complainant,*

versus

ERNEST O. THOMPSON, *et al., Defendants.*

Before Hutcheson, Circuit Judge, and McMillan and Kennerly, District Judges.

HUTCHESON, *Circuit Judge:*

On amended pleadings bringing down to date* the proration orders of the Commission, plaintiffs complain of, these causes went on January 6, 1936, to final hearing on their merits.

Though complainants' attacks were leveled against both the Statute, House Bill No. 266 (Acts of Texas 1935 c. 120 Vernon's Ann. Civ. Stats. Texas Art. 6008) and the orders of the Commission, the primary attack was, it was bound to be, on the orders. For none of the matters of which

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*Note 1. *Texas Panhandle Gas Co.* v. *Thompson,* 12 Fed. Supp. 462.

complaint is made are the result of the self-execution of any of the provisions of the Statute. They arise on, they exist, only because of the orders. The Act is under attack only if and to the extent that it supports the complained of orders. Both Act and orders are greatly comprehensive. The Act declares the policy of the State in the conservation of natural gas and the prevention of waste in its development and production, and provides broadly for its administration by the Commission. It classifies gas as sweet and sour, fixes the uses to which each kind of gas may be put, authorizes the zoning of fields for the purpose of their regulation and administration, directs the Commission in the discharge of duties imposed and powers conferred, and provides penalties. The specific sections of the Statute involved here are Sections 10 to 20, Vernon's Ann. Civ. Stats. of Texas, Art. 6008.*

The orders under attack, particularly that of December 10, 1935, are, as to the area in question, the Panhandle District of Texas, like the Statute, conceived and couched in comprehensive terms, and purport in accordance with the Statute, to bring the whole field under a comprehensive plan of regulation and control. Upon a full recitation of

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*Note 2. Section 10 directs the Commission to prorate and regulate the production of gas from each common reservoir for the protection of private and public interests, (a) in the "prevention of waste as defined herein," (b) "In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this article." The remaining sections direct when and how the Commission shall discharge the duties imposed and exercise the authority conferred.

These sections provide for the hearing and determination of waste and market demand and for zoning fields. They designate the limits within which the restrictions may be imposed and generally lay out and prescribe the Commission's course in discharging its agency.

the history of the field, physical political and legal,** which we adopt as substantially correct; in general this plan created two zones, the Eastern and the Western, fixed the drainage area of each well in each of these zones, and, in the Western Panhandle Field, where alone sour gas was found to exist, established a line of demarkation between sweet and sour gas areas.

**Note 3. *Special Order Fixing Allowable Production of Sweet and Sour Natural Gas in the Panhandle District of Texas.*

"The Panhandle oil and gas field structure lies along a buried mountain range known geologically as the Amarillo Arch, that extends along the length of the field, continuing in a southeasterly course into the southwesterly portion of Oklahoma, where it comes to the surface as the Wichita Mountains, at an elevation of approximately 1000 feet above sea level. The field is a belt lying in a southeasterly northwesterly direction and extends from eastern Wheeler County to northern Moore County, Texas. It is approximately 124 miles in length with an average width of approximately 20 miles, containing 1,504,386 acres; there being 1,066,662 acres of sweet gas, and 437,724 acres of sour gas territory. The field is located in the counties of Hartley, Moore, Hutchinson, Potter, Carson, Gray and Wheeler. The oil producing area covers a belt about 90 miles in length lying on the northeast flank of the structure.

The oil and gas so far encountered in the Panhandle Field has been found, with minor exceptions, in four separate strata; namely the dolmite, and arkosis-dolmite, the gray limestone and the granite wash. These four formations overlie one another, and though they are normally separate one from another by impervious starta, they are interconnected as is shown by the fact that the virgin pressure of the oil and gas from all of them was 430 pounds per square inch at sea level, regardless of the location in the field.

Gas was first discovered in northern Potter County, Texas, in December, 1918, and was encountered at a depth of 2,605 feet. The gas production for several years was developed only incidentally in the search for oil. The first

Plaintiffs do not complain of the zoning provisions of the order. Neither do they complain of the Statute or order demarking sweet from sour gas areas and dedicating gas from the wells in each area to the uses the Statute provides. Their complaint is general against the provisions of the order which, fixing an allowable production from plaintiffs' wells below the amount they require and have

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important oil was discovered in 1925 and the major oil pools were developed in 1926 and 1927. The development of the gas field became prominent about 1926, and continued until 1929 when it was temporarily halted by the "depression." Since 1933, the gas field has been developed at a very rapid rate.

The oil wells in the oil pools in the field were, as a general rule, drilled through one or more gas-containing strata before entering the oil-containing stratum, and, in many instances, the wells were so completed as to cause production of gas from the gas strata along with the oil and gas from the oil stratum, with the result that tremendous quantities of gas have been produced with the oil, large portions of it coming from gas-producing strata above the oil-producing strata. This gas was in large part blown into the air, and it has been estimated that in excess of two trillion cubic feet of gas produced in this manner has been wasted into the air.

Coincident with the development of the Borger pool casinghead gasoline plants were erected therein in which considerable portions of the gas produced therein were processed for the extraction of the gasoline content thereof, and, there being no market for the stripped gas, called "residue gas" resulting from the operation of said plants, the bulk of such residue gas was wasted into the air. In varying degrees, the same is true of the other oil pools as they were developed and operated.

The Panhandle Field is so far removed from centers of population and industrial activity that little value was at first placed upon the enormous quantities of gas therein found, but, due to the development of the casinghead gasoline plants and the result abundant supply of cheap residue

been taking from their wells to serve their customers' needs, makes it compulsory upon them to purchase from the wells of others gas of which plaintiffs have an already amply supply. Their claim as to these provisions is that since it is undisputed that plaintiffs are and always have been producing their wells without waste of any kind, the order as to plaintiffs is not a waste order; but as all the prior orders have been, simply one designed to furnish

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gas that was being wasted into the air, the carbon black industry was attracted to the area, and in September, 1926, the first carbon black plant was completed. It was located in the Borger pool, and proceeded to burn considerable quantities of such residue gas for the manufacture of carbon black. Thirty additional carbon black plants have since been built and placed in operation in the field. The combined throughput capacity of said plants is approximately 570,000,000 cubic feet of gas daily. In excess of 70 per cent of the carbon black manufactured in the United States is being manufactured in the Panhandle Field.

There are, at present, 1090 natural gas wells in this field. These wells have a total daily open flow potential of 17,231,183 M.C.F. Of this total 225 wells produce sour gas, and these wells have a total open flow potential of 2,099,985 M.C.F. daily. In the oil producing belt there are 2,527 oil wells producing from 27 different pools.

Development throughout the Panhandle Field has long since proved to be the largest known reserve of natural gas in the United States. The demand for gas for light and fuel uses was local and was relatively small, prior to 1926.

The construction of pipe lines began in January, 1926, when the Northern Texas Utilities Company started transporting gas to towns in northern Texas, the principal one of which was Wichita Falls. In July of 1927, the Lone Star Gas Co. started running gas in Northern Texas, principally into Ft. Worth and Dallas. In the early part of 1928, the South Plains Pipe Line Company and the Cities Service Gas Pipe Line Co. started transporting gas from this field, the former into towns south of Amarillo in West Texas

markets to those having none. They insist that these pretended proration, but in reality reduction, orders are invalid, (1) because not authorized by the Statute they purport to administer, and (2) because they take plaintiffs' property without due process of law, and deny them the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States and of Secs. 16, 17 and 19 of Article 1 of the Constitution of Texas.

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and the latter to Kansas City, Missouri. In June of that year the Canadian River Gas Company began transporting gas into Colorado, principally into the cities of Denver and Pueblo. In November of that year Texas Panhandle Gas Company began using its line to transport gas into Oklahoma and Wichita, Kansas. There was relatively little development by pipe lines from this time until June of 1931, when the Panhandle Eastern Pipe Line Company began transporting gas through its line as far as Indianapolis, Indiana.

In October of 1931, the Texoma Natural Gas Company began its operations. The gas transported by this line was carried to markets in Nebraska, Iowa, and Illinois, the principal market being Chicago and its vicinity. In May of 1932, the Northern Natural Gas Company began its operations in which it transported gas into Nebraska and Iowa, principally into the towns of Des Moines, Iowa, and Minneapolis and St. Paul, Minnesota.

The total length of these nine major pipe lines approximates 4,425 miles, and the total capacity thereof is approximately 1,000,000,000 cubic feet of gas per day. A daily average of approximately 300,000,000 cubic feet of gas was transported from the Panhandle Field through these lines during the year 1933 and a daily average of approximately 400,000,000 cubic feet of gas was being transported through said lines during the year 1934; and the daily average amount being transported therethrough at the present time is approximately 450,000,000 cubic feet.

These major pipe line companies acquired and now hold under least approximately 850,000 acres of land, which is

As to the Statute, they complain of it as violative of the constitutional provisions above invoked only if it be held to support the orders. Their complaint on this score is general, it goes not merely to the particular scheme, but to any scheme of proration the Commission may devise. Their insistence is that no scheme of allocation or proration which is designed to and will curtail complainants' production, and by preventing their taking their own gas, compel them to buy from adjoining well owners can be constitutionally applied against them. They insist that the proof is clear and abundant, in fact, it is admitted, that

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about 61 per cent of the total gas producing area in the Panhandle Field, each such company separately owning and operating its own leases. Of the total area proven productive of sweet gas these major companies own approximately 80 per cent. They have not and are not taking or transporting sour gas through their lines. Unless such gas is treated, it is not suitable for light fuel and domestic uses. The demand for sour gas for light and fuel uses is restricted to isolated lease purposes.

Six or seven of the major pipe line companies have produced and transported to the markets gas produced from only their own gas leases (or the leases of their respective affiliated or subsidiary companies), and have not purchased gas from other lease owners in the field. Prior to and since the passage of said Act, many of the un-connected lease owners have repeatedly endeavored to induce those companies to purchase gas from their lands, but without avail. Some of these companies have been and are willing to purchase gas ratably in the field, if all the others would do so, and two companies have made thirty (30) new connections and are taking ratably from these connections.

In addition to the major pipe lines there are ten additional pipe lines of lesser capacities serving local towns and cities in the immediate vicinity of the field, with a throughput capacity of approximately only 65,000,000 cubic feet of gas per day. For the most part, these small pipe line companies own their own leases and supply their requirements therefrom, although some of them purchase

from the beginning they have conducted their operations prudently and without waste, and have taken for their use only a small part of what they own. Especially do they insist that the orders are partial and unjust as to them, for not only have they not injured their neighbors by excessive takings in proportion to their holdings but they have themselves been greatly victimized by the excessive, exorbitant, and wasteful takings, far in excess of their

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some of their requirements from other lease owners. Nevertheless, a very large number of separately owned leases have remained without connections with market outlets. In fact, there are more than 90 gas wells that have never had a connection. The pipe line companies, large and small, have taken up all the markets economically and practically available for sweet gas from the Panhandle Field, and their control thereof constitutes a virtual, if not an actual, monopoly of said markets.

The policy of most of the pipe line companies operating in this field to take gas from only those wells which they owned, to the exclusion of the other operators in the field has resulted in a protracted controversy between them and those operators in this field without a market. This controversy resulted in the passage by the Legislature of the State of Texas of a number of bills, all of which had as their purpose the protection of the right of these operators to sell their gas. In 1931 the Forty-second Legislature passed what is known as the Common Purchaser Act. This law required that pipe line companies taking gas in the State should be considered as a common purchaser and should take gas ratably under conditions which should be prescribed by the Railroad Commission of Texas. As a result of this Act the Railroad Commission issued orders which had the effect of requiring the distribution of the markets of the pipe line companies among the various producers in the field in proportion to the daily open-flow potentials of the wells owned by those producers. This law was attacked by several of the gas pipe line companies in the United States District Court for the Western District of Texas and the Statute and the orders of the Railroad Commission issued thereunder were stricken down.

ownership of well owners from whom the orders in question, if enforced, will compel plaintiffs to buy back their own gas already diverted from under their land.

In subordination to this general complaint, and only in event it be not sustained, plaintiffs complain of the order in the particulars to which it has descended in providing the proration scheme, as not in accordance with the Statute it purports to rest on, and also as violative of the con-

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As a result of the failure of the Common Purchaser Act, the Second Called Session of the Forty-second Legislature passed an Act which provided that the Railroad Commission should determine the market demand for any particular field, and should allocate the production in this field among the various producers to meet this market demand. The Orders entered by the Railroad Commission as a result of this Act were again attacked by the same pipe line companies in the United States District Court for the Western District of Texas and were stricken down.

As a result of the failure of these Legislative attempts to obtain ratable production, there was passed by the First Called Session of the Forty-third Legislature a bill known as the Stripping Law or the Sour Gas Bill. This bill, in effect, gave to the Railroad Commission the power to permit the use of natural gas for any beneficial purpose. Before the passage of this bill, it had been the policy of the Railroad Commission to permit the use of casinghead gas only in stripping operations, but after its passage, the Railroad Commission began issuing permits to strip dry natural gas. As a result of the issuing of these permits, a number of gasoline plants were built and began to operate in the field.

During the fall of 1933 and the year 1934, five gasoline extraction plants were built and began operations. In addition most of the gasoline plants which had been operating entirely on casinghead gas were converted into stripping plants. As a result of these developments, by the fall of 1934, in excess of one billion cubic feet of gas was being blown into the air daily. These operations so rapidly depleted the gas field that it soon became evident that some

stitutional provisions already invoked. The particulars of which they complain are that in the purported effort to comply with the Legislative direction* for fixing the daily allowable for each gas well in a common reservoir, the respondents have departed from it and have unjustly, unfairly and unreasonably fixed their allowable. They have fixed it by arbitrarily disregarding factors the Statute fixed as controlling, and arbitrarily selecting a standard or basis having no reasonable relation either to the legislative directions or to the physical situation. Instead of taking into account, as the Statute requires, the size of the tract, its producing capacity and the actual drainage area

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other solution of the problem must be obtained. Hence, in the spring of 1935, the Forty-fourth Legislature passed a comprehensive conservation Statute known as House Bill 266, the purpose of which was to prevent waste and compel ratable production."

*Section 13: "In determining the daily allowable production for each gas well the Commission shall take into account the size of the tract segregated with respect to surface position and common ownership upon which such gas well or wells are located; the relation between the daily producing capacity of each gas well and the aggregate daily capacity of all gas wells producing the same kind of gas in the same common reservoir or zone; and all other factors which are pertinent; provided that the Commission shall not take into account the size of the tract upon which any gas well or wells are located in excess of the efficient drainage area of such well or wells, producing at twenty five per cent (25%) of the daily productive capacity, which drainage area shall be determined by the Commission. In ascertaining the drainage area of a well, the Commission shall take into account such factors as are reflected in the productive capacity of a gas well, including formation pressure, the permeability and porosity of the producing formation, and the well bore's structural position, together with all other factors taken into account by a reasonably prudent operator in determining the drainage area for a gas well."

of each well, the Commission has arbitrarily fixed the drainage area of each well in the Eastern Panhandle Field at 160 acres, in the Western Panhandle Field at 640 acres, and has fixed the allowable of each well by an arbitrary formula allowing 50% based on the potential of the wells, and 50% based not on the real drainage area, but on the acreage the Commission has arbitrarily assigned to each well. (2) It has made this more arbitrary by extending this formula of acreage influence to tracts very much smaller in size, thus allowing tracts held in smaller acreage ownership a greatly larger proportionate production than tracts like complainants, held in large ownership.

Respondents insist that the Statute and the orders must be looked at and construed in the light of the conditions of wasteful use existing especially in the sour gas area where gas was being stripped when the Statute was enacted, and in the light of the present inability of many well owners for want of light and fuel markets, to make use of their gas. They declare that every intendment should be indulged in favor of their validity, since the public interest in the conservation of gas as a natural resource of the State, the existence of wasteful conditions in portions of the Panhandle field when the Statute was enacted, and the power of the State through the Commission, to put a stop to wasteful practices, are beyond question. They urge that the Legislature having these conditions in mind, intended and by the Act has provided for, proration of production not only to prevent waste, but also to bring about a condition which will enable owners of wells in the field having no markets, to get their gas to market through selling it to those who have. They point to the Commission's finding and order that a waste condition exists in the Panhandle Feld which requires proration of production, and to the proof they offered here to support it. They point to the admitted fact that there are wells in the sweet gas area of each of the Panhandle zones which under the present Statute restricting the use of that gas for light and fuel have no outlet for their gas, unless complainants and other pipe line companies will buy it from them. They insist that the order must be sustained both on the ground that it has a reasonable relation to the prevention of waste

in the field generally, and on the ground that apart from waste it is valid as a "correlative rights" measure, a measure for the protection of well owners who under the Statute as it now stands will have no market for their gas, unless complainants and others be compelled to buy from them. Complainants on their part insist that it appears beyond question from the recitals in the Commission's order and from the evidence in the record, that as to them the order was not designed for, it has no relation, to the prevention of waste. That it was designed for, relates to, and effects only the dedication of plaintiffs' markets and facilities to the wishes and needs of well owners having none, by instituting indirectly a scheme of compulsory purchase.

On the preliminary hearing we were of the opinion and so wrote, that the Statute in question was a waste Statute. That it had not attempted, except in connection with and as a part of waste prevention, to authorize the proration of production. We held further that if the Legislature meant to say that without regard to questions of waste persons who had provided themselves with markets should, merely because other well owners had none for their gas, be prevented from taking their needs from them, the law would on its face be a class law, unjust and partial. We held that designed as it would be to take the property of one class to devote it to the use of others, it would constitute a taking of property without due process, a denial of the equal protection of the laws. On that hearing the idea was advanced by those who appeared on the side of the Commission, but in actual representation of those whose wasteful uses the present law forbids, that the Legislature wished to prohibit the use of gas for wasteful purposes but was unwilling to do so except upon the condition that these persons be supplied markets for the permitted use. That in order to placate those whose wasteful uses it had forbidden, the Legislature had enacted a law designed to supply them with markets by compelling those having facilities and markets, to buy from them. We rejected that contention. It is not, as we understand it, reurged.

We held also that the proof tended to, if it did not wholly, overthrow the claim that the order was a real waste order, looking toward and having a reasonable relation to waste prevention. We thought the orders as to plaintiffs was,

as the orders enjoined in the three previous cases had been, merely orders having the purpose and result to accomplish the unlawful end, of in effect expropriating the property of one and forcibly giving it to the use of others. On this hearing a vast amount of testimony was offered, illuminating the actual physical conditions in the entire field. A considerable part of it consisted of opinion evidence more or less expert; opinion evidence as to practical facts and conditions which could be checked and rechecked with the physical conditions observed in the field. This opinion evidence, in most particulars indeed as to the controlling, the real points in the case, was on the whole without conflict. There was in addition some opinion evidence offered in the case on the ultimate question tendered for trial and decision, that is, whether the orders bore any just or reasonable relation to the prevention of waste, in the sweet gas field. These opinions were of an order of proof having little if any probative force, because no more than speculation, surmise and conjecture, the opinion of witnesses on the ultimate fact for decision, a kind of evidence universally held insufficient to constitute proof. *Miller* v. *United States,* 71 F. (2d) 361; *United States* v. *Spaulding,* 293 U. S. 498; *United States* v. *Bass,* 64 F. (2d) 467; *United States* v. *Sauls,* 65 F. (2d) 886; *United States* v. *Harris,* 79 F. (2) 341; *Peoples Petroleum Producers* v. *Smith,* 1 Fed. Supp. 361.

A careful consideration of the record as it relates to waste in the Panhandle Field as a whole leads us to these conclusions: (1) Before the going into effect of House Bill No. 266 grossly wasteful practices were going on in parts of the field with the result that enormous quantities of gas were wasted. (2) No substantial evidence was offered, indeed, it was not even seriously claimed, that anything complainants had done or contemplated doing has in the slightest degree, contributed or will contribute to that waste. The Statute as it now exists prohibits the use of sweet gas, except for light and fuel. As regards these uses it is undisputed that there has not been, there is not now, and in reasonable probability there will not be, at least at any time in the near future, any waste, for the demand for these uses is not only limited but in supplying it, on account

of the nature of the uses, only the most prudent and non-wasteful practices may be, are being and will be employed. The only kind of gas plaintiffs have is sweet gas. The proration order as to them was as to such gas. As to gas for these uses, there is not, there has never been, a real market in the field, for except for a small quantity consumed in operating wells and plants, gas for this use is not sold in the field. It is transported on contracts to distant points for delivery at the burner tips.

The Commission's proration order was therefore based not upon market demand in the field, but upon the amount required by plaintiffs and other pipe lines for supplying their customers at distant points. This allowable was designedly fixed at a point sufficiently below their full needs such as to require their filling these needs from wells without markets.

(3) In view of these facts, there is no credible evidence to justify the conclusion that as applied to these complainants, the restriction of their production below their absolute needs was in the slightest related to the prevention of waste of gas, or as to them would have any reasonable purpose or effect whatever, except to furnish a market for those whose prior wasteful uses of gas the Legislature now prohibits. We therefore reject, as without basis in the record the claim of respondents that the orders must be sustained as waste measures, enacted to prevent waste with an eye single to the performance of that duty and function, and find instead that they are orders enacted to bring about a compulsory purchase upon the theory of protecting correlative rights.

We come then, to defendants insistence vigorously urged upon us, that we erred in our former opinion in holding that the Statute did not authorize the Commission upon considerations alone of providing markets for gas well owners without them, to effect marketing arrangements between those who had and those who had not markets, by ordering the amount of the required production from wells having markets, to be prorated over all gas wells in the field. We are not shaken in that opinion. We think it quite clear that the Legislature did not seek to exert such power. In deference however, to the elaborate attack of respondents upon that ruling, and their urgency and in-

sistence that we reconsider it, we will set out more fully our reasons for thinking so.

(1) The plain terms of the Act, in their own light, in the light of the history of the regulation for conservation of oil and gas and of the particular conditions under which it was passed, make it abundantly clear that this Act is designed to implement the Commission in dealing with the glaring and patent waste problems which the Panhandle and other gas fields presented. The declaration of policy contains nothing to bear out the claim that independent of waste prevention, the Legislature was instituting a new rule of property in Texas. What we said in *Canadian River Gas Co.* v. *Terrell*, 4 Fed. Supp. 226, as to the gravity and seriousness of the problem involved in such an attempt to change the laws and that an intention to do so would not be lightly imputed to the Legislature, applies to this Statute. Its declaration of policy does not declare that the Statute was enacted to declare and define correlative rights, to compel one having markets to share them with another, to create a new rule of property, and authorize the Commission to ascertain and settle, without judicial intervention, rights in a gas field. It simply declares that in recognition of past, present and imminent evils occurring in the production of natural gas as the result of waste in the production and use thereof, in the absence of correlative opportunities of owners of gas to produce and use the same, it was enacted for the purpose of prohibiting waste and compelling ratable production.

Section 10 couples the adjustment of correlative rights with the prevention of waste, and Section 11 specifying the conditions under which the power granted shall be exercised, still couples them. Nowhere in the Act is there any provision which in terms or by reasonable construction, can be construed as authorizing the Commission to prorate production, waste apart, on considerations of sharing markets. This we think is the necessary, the inescapable construction of the Act, if all constitutional questions are laid aside. When the construction is approached in the light of constitutional limitations, the conclusion is further compelled that the Statute was not intended to have, it cannot be given the meaning respondents contend for.

It is the duty of courts to give a constitutional, rather than an unconstitutional, construction to a Legislative act, to give it a meaning if its terms permit of it, which does not put it in opposition to the fundamental law. That principle applied here imperatively demands that we reject the construction respondents insist upon, for that construction would place the Act in direct and fatal opposition to both State and Federal Constitutions.

It is significant to note that in not a single case of the many cited by respondents, had the attempt been made to exert the power of regulation by way of forcing one to buy from another. In every one of them the question of the rights of owners in a common pool has come up in connection with and only in discussion, of a waste measure. In every case where the question of correlative rights has come up it has been discussed collaterally. In every case the spearhead of the state's thrust has been its conservation powers, its right, in the public interest, to conserve its natural resources. What the courts have said of correlative rights has been said incidentally. It has come up in connection with a discussion of the consequences and effect of waste, and the right to prevent those consequences. In contending otherwise respondents, we think, misread the cases. In no case in Texas, except in this case, and the *Canadian River* case *supra,* has the question of the power of regulation, for the sole purpose of preserving correlative rights, been raised. In *Brown* v. *Humble Oil Co.,* 83 S. W. (2d) 935, a leading Texas case, correlative rights were discussed in connection with a waste statute. It was exerted as a part of its duty to prevent waste. Considerations of preventing waste have been the genesis of every gas and oil law passed on by every court which has been cited to us or which we have found. The *Ohio Oil* case, 177 U. S. on which respondents place their main reliance, was of precisely that kind. Putting to one side all questions of the difference between the rules of property in gas and oil in Indiana and in Texas, and taking that case at its fullest value for respondents, it decided nothing but that in the interest of waste prevention, the complete wastage of the gas by popping it into the air, the Legislature could control

gas production, to the extent of preventing its being used as a gas lift for oil. What was said about correlative rights was said only incidentally. The real decision is found in this supposition and its vigorous denial.

> "It is certain, if there can be no authority exerted by law to prevent the waste of the entire supply of gas and oil, or either, that the power which exists in every one who has the right to bore from the surface and tap the reservoir involves, in its ultimate conception, the unrestrained license to waste the entire contents of the reservoir, by allowing the gas to be drawn off and to be dispersed in the atmosphere, and by permitting the oil to flow without use or benefit to any one."

This denial all subsequent courts have sustained. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 72, on which respondents especially rely, illustrates the point. There as particularly shown in the New York decisions on which that opinion was based, *Hathorn* v. *Natural Carbonic Gas Co.*, 194 N. Y. 326, and *People* v. *New York Carbonic Acid Gas Co.*, 196 N. Y. 421, the validity of the statute was expressly grounded upon the authority of the State to prevent the waste of its natural resources. On page 73 it is said:

> "The courts of New York construed this provision not as prohibiting the specific acts absolutely or unqualifiedly, but only when the mineral waters are drawn from a source of supply not confined to the lands of the actor, but extending into or through the lands of others, and then only when the draft made upon that source of supply is unreasonable or wasteful, considering that there is a coequal right in all the surface owners to draw upon it. In other words the court, by processes of interpretation having its approval, read into the provision an exception or qualification making it inapplicable where the waters are not drawn from a common source of supply, and also where, if they be drawn from such a source no injury is done thereby to others having a like right to resort to it."

So *Walls* v. *Midland*, 254 U. S. 300, after all of the discussion was over and done, came to the same point, the court saying on page 313:

> "The question in the case is, as we have said, whether the legislation of Wyoming is a valid exercise of the police power of the State and brings into comparison the limits of the power as against the asserted rights of property, whether the legislation is a legal conservation of the natural resources of the State, or an arbitrary interference with private rights."

Discussing the *Indiana* case, which respondents say was not a waste case, the court said of it:

> "The suit was by the State, and was based upon a statute which was directed against and prohibited one having possession or control of any natural gas or oil well, to permit the flow of gas or oil to escape into the air. From the standpoint of the law, to do so was a waste of gas. A right against the statute was set up, based upon the asserted or implied postulate that the owner of the land owned all beneath the surface and all that could be brought to the surface within the lines of the land. The postulate was rejected upon the ground of the nature of the gas, the capability of its flow from place to place, the common right to domestic and industrial use of it and the power of the State to regulate and conserve such right." * * *
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> "It was hence decided that the power of the State can be manifested for the purpose of protecting all the collective owners by securing a just distribution, to arise from the enjoyment by them of their privilege to reduce to possession and to reach the like end by preventing waste."

In *People* v. *Associated Oil Co.*, 294 Pac. 717, affirmed as *Bandini* v. *Superior Court*, 284 U. S. 8 is an interesting and complete discussion of the question of the relation of waste and correlative rights. Of the *Ohio Oil Co.* case, the lead-

ing case on the power of a State to prevent waste by the escape of natural gas, the Court said:

> "There is considerable discussion in that case concerning the protection necessary to be accorded the correlative rights of adjoining landowners in the same field, and the petitioner herein seeks to confine the holding of the Supreme Court in that case to the protection, under the exercise of the police power, of those correlative rights. But the holding in that case cannot be so limited. The decision in that case defines the so-called correlative right not necessarily as a right to fixed distributive or proportional share of the oil and gas underlying the surface, which no other owner of soil overlying the same reservoir may take and use beneficially but as a coequal right to take whatever of the oil and gas can be captured, so long as waste, as defined by the statute, is not committed."

This is the substance and the effect of all the Legislative acts and of the decisons of the courts to which we have been directed. As far as we are advised no Legislature has yet enacted a law, no court has yet construed one, which in the interest solely of securing to each his rightful share of oil or gas in a common pool or reservoir, has in a comprehensive and complete way undertaken to provide machinery for determining and securing these rights and for fixing the takings of each owner from the reservoir in accordance therewith. We do not say that no Legislature can do this. We do not say because it is a new kind of exertion of police power, it must be held to be beyond the scope of it.

> "The police power of a State, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood, which are calculated to prevent a conflict of rights, and to insure to each the uninter-

rupted enjoyment of his own so far as it is reasonably consistent with a like enjoyment of rights by others." *Cooley on Constitutional Limitations*, p. 572, quoted in *People ex rel N Y El. Lines Co.* v. *Squire*, 107 N. Y. 593-605.

By force of this doctrine it may be that by a complete comprehensive scheme which, consistent with due process, considers and has due regard for the rights and equities of all, the Legislature of Texas may be able to provide by law for an equitable ascertainment, partitioning and fixing of them so that each could take only what was thus determined to be his own. We do not say that it cannot do this. We say merely that it has not done so. We say that House Bill No. 266 cannot be said to have either this object or this effect. In the first place, it considers only wells actually drilled. No cognizance is taken of the great amount of undrilled territory. In the second place, even as to wells already drilled, it makes no provision for a definite and final ascertainment, partition, and setting aside to each owner of the amounts he is entitled to draw from the reservoir. It provides merely for a temporary, and therefore arbitrary allocation to each well owner of a part of the contract market or some of them. The evidence makes it plain that complainants have been taking gas in an orderly fashion, and in a total far less than under any equitable theory of measurement would be apportioned to them, while some of those in whose interest under the notion of correlative rights the orders seek to administer the Act, have been taking it exorbitantly, disproportionately, and wastefully. No provision is made in the Act for taking into account these and many other matters which must be considered if any equitable and fair distribution between adverse interests is to be attempted.

In addition, if the Act be construed as intended to appoint the commission as a body to ascertain and partition rights of oil and gas owners, it would be a palpable and direct violation of sec. 1, Art. 2, of the Constitution of the State of Texas, in that, contrary to that provision, it would be an attempt to delegate to the Commission both legislative and judicial powers, leaving to it at will by regulations

of its own devising, to take from one and give to others, rights in property. A roving commission of this kind, to undo and set up, to take away and restore, the property rights of the people, may not be thus delegated. *Board of Water Control* v. *McKnight*, 229 S. W. 301; *Dockery* v. *State*, 247 S. W. 408; *City of San Antonio* v. *Zogrish*, 70 S. W. (2d) 333. c/f *Panhandle Co.* v. *Highway Comm.*, 294 U. S. 613.

Because of the view we entertain and have expressed, that the Commission is entirely without power under the Act to prorate plaintiffs' production on a theory of correlative rights, and because there are no waste conditions in the sweet gas area it is equally without power to prorate it on the theory of waste, we find it unnecessary to consider or decide the subordinate questions complainants raise on the orders. On the view we take of the case before us the particular formulaes the Commission has now adopted, the particular bases it has assumed for its proration, are unimportant. The evidence makes out a case for relief, because it is plain, so that all may see, that under the statute as it now exists there are no waste conditions in the sweet gas area which the order is designed to or will remove or affect; but masked under the guise of regulation it is the exercise of coercion to take from one and give to another.

The force of government in America may not be exerted to bring about such partial, such unjust, effects.

> "Recognizing the difficulty in defining with exactness the phrase 'due process of law' it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property or right to property shall be taken for the benefit of another, or for the benefit of the State, without compensation." Holden v. Hardy, 169 U. S. 390.
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> "Justice is the bond of men in states, and the administration of justice, which is the determination of what is just, is the principle of order in political society." The Politics of Aristotle, p. 5 (World's Great Classics).

"Justice is the end of government; it is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. The Federalist no. 50."

"Governments have in general but two means of overcoming the opposition of the people they govern, viz: the physical force which is at their disposal, and the moral force which they derive from the decisions of the courts of justice. * * *"

"The great end of justice is to substitute the notion of right for that of violence, and to place a legal barrier between the power of the government and the use of physical force." De Tocqueville, "Democracy in America" p. 138.

This is the principle of Democracy in America; the spirit of its laws.

The Fifth and the Fourteenth Amendments to the Federal Constitution, and Art. I, sec. 17 of the Texas Constitution, are based upon a recognition of this principle. Because they are though they do not operate to prevent the reasonable and just exercise of the police power of the State, they do limit its exertion within just and reasonable bounds.

"The police of a State, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the State to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of self protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury." *Panhandle Company* v. *Highway Comm'n.*, 294 U. S. 613.

"Vague, shadowy, and shifting though the limits of this power sometimes appear to be, it is settled that in the exercise of the police power a state may take,

damage, or destroy private property without compensation when the public necessity, the public health, or the public safety require it to be done. Because, however, these limits are shadowy, vague and apparently shifting; it is in the last analysis for the courts to say whether questioned action has properly called into being the exercise of the power, and whether the power is being exercised reasonably and within the limits of public necessity. *Spann* v. *City of Dallas,* 111 Tex. 357; *Peoples Petroleum Producers* v. *Sterling,* 60 F. (2d) 1041; *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393." *Hulen* v. *City of Corsicana,* 65 F. (2d) 969.

This controversy has been long drawn out. In varying forms under different statutes, but always to the same purport and effect as to these complainants, order after order has been drawn enjoined, and drawn again. This is the fifth time this Court has written. *Texoma Natural Gas Co.* v. *R. R. Comm.,* 59 F. (2d) 750; *Texoma Natural Gas Co.* v. *Terrell,* 2 Fed. Supp. 168; *Canadian River Gas Co.* v. *Terrell,* 4 Fed. Supp. 222; *Texas Panhandle Gas Co.* v. *Thompson,* 12 Fed. Supp. 462. From none of these decisions was an appeal taken.

If the principles on which we have proceeded have been wrongly taken, this should be determined by an appeal. Continued litigation of these questions in the trial court will not settle them. Contested matters of this kind should be settled, litigation should be brought to an end.

A decree for complainants in accordance with this opinion may be settled and filed.

APPENDIX "B".

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION.

No. 539. EQUITY.

TEXAS PANHANDLE GAS COMPANY

vs.

ERNEST O. THOMPSON *et al.*

HUTCHESON, *Circuit Judge:*

A continuation of the controversy which has long been going on in the Panhandle gas field, this litigation has for its background the same familiar figures, the same interests, the same general issues. *Canadian River Gas Co.* v. *Terrell* (D. C.), 4 F. Supp. 222; *Texoma Natural Gas Co.* v. *Terrell et al.* (D. C.), 2 F. Supp. 168; *Texoma Natural Gas Co.* v. *Railroad Commission* (D. C.), 59 F. (2d) 750; *Sneed* v. *Phillips Petroleum Co.* (C. C. A.), 76 F. (2d) 785. Here, as before, in the favorable situation of the pipe line companies as to market for their gas for light and fuel uses, and the unfavorable situation of other well owners who have not markets, may be found the real genesis of the law and order under attack.

All recognize that this is so. All agree that the purpose and the probable effect of the order complained of will be the same as that intended for the orders enjoined in the earlier cases, to require plaintiff, and those situated like plaintiff, to supply part of their needs by purchase from well owners having no markets, by preventing their supplying all of them from their own wells.

Plaintiff insists that the law itself, the order issued under it, and the facts it is applied to, are in substance the same law, the same order, and the same facts as those which were presented and ruled adversely to the Commission in the earlier cases. Defendants deny this. They say that at last they have a law and order which, based on a

different situation and exerting different powers, presents a valid exercise of the police power, a valid regulation of the state's natural resources. They claim that the grounds of invalidity successfully urged against the orders in those cases do not apply here, because (a) this one rests upon a finding of waste, and (b) was entered in the exertion of a power to protect correlative rights, not granted to the Commission in the earlier cases, but specifically granted here.

Plaintiff insists that the finding of waste is a fiating, not a fact finding at all, a mere arbitrary conclusion entered without any credible evidence to support it, and flatly contradicted by the admissions, and all the evidence in the former cases, and all the credible evidence in this. It points to the fact that it was entered after the order, promulgated by the Commission under its claimed authority to equalize opportunities in the field, had come under attack, as conclusive that it is a mere makeweight fiating, to bolster up the insufficient grounds originally put forth. It insists that the order in form limiting the plaintiff to the use of its market facilities and markets, but in fact designed to appropriate them in part to the use of other well owners not so equipped, was entered and must rest, not upon considerations of preventing waste, but entirely upon those of equalizing one well owner with another, by so limiting the takings from their wells, of those having markets and market facilities, as to compel them to purchase and take from the wells of those who have neither.

Upon the showing in plaintiff's bill as to the similarity, if not complete identity, of this case with all the others, and that the immediate enforcement of the order against it would either deprive plaintiff's customers, towns and cities, and their people, of the gas they counted on to sustain their civic life, or would put plaintiff to an enormous expense unnecessarily incurred if the law and order were held invalid, a restraining order pending the interlocutory hearing was issued.

The considerations which there prevailed, that no substantial injury could follow a temporary restraint pending hearing, while serious and irreparable inconvenience

and loss would certainly follow the refusal to grant it, are urged upon us here in support of plaintiff's application for an interlocutory injunction pending a hearing of the cause on its merits. Defendants insist that the temporary injunction should be denied. They urge that the questioned order was entered to make effective a comprehensive legislative scheme to regulate and control the taking of gas from the field, so as to prevent its waste; that a part of that scheme was to supply a market for light and fuel to owners of wells whose use of their gas for stripping and other wasteful purposes the amended law had prohibited; and that, if the pipe line companies were permitted to supply their requirements from their own wells without sharing their facilities with others, there would result the injustice of depriving well owners without market for light and fuel of right to use their gas, while others with markets were permitted to fully use theirs.

Plaintiff, conceding that this would indeed be the result, insists that, not the situation caused by the present law, but that complained of in *Sneed* v. *Phillips Petroleum Co.*, *supra*, caused by the old law, was the unjust one; that the present law prohibits all from wastefully using, enjoins upon all to use, gas nonwastefully; that plaintiff is not now using, and never has used, its gas wastefully, and that those for whose benefit the Commission has enacted its order have the same right in law to use their gas for light and fuel purposes as plaintiff has, if they will, at their own expense, as plaintiff did at its, provide themselves with market facilities and markets. It insists that there is no principle under our law by which the facilities and property of one person may be appropriated by law to the use of another. It declares that an order attended with such results is supported by no presumptions, but, on the contrary, comes heavily burdened with presumptions against it.

In addition to invoking the protection of the Federal Constitution, plaintiff points to and invokes the state statutes (Vernon's Ann. Civ. St. Tex. art 6049c, Sec. 8) authorizing court review of orders of the Commission and the granting of an injunction (section 10) pending final judg-

ment in that proceeding. Insisting that, whatever may be the correct rule as to the presumptions attending the findings of the Commission and the burden to overthrow them when the Federal Constitution alone is invoked, the statutory burden in a review proceeding is met when a preponderance of the evidence shows the order to be wrong. It reminds us of the state statute providing that, pending the trial of that issue on the merits, one who seeks a review of the Commission's order, may have the status preserved by a temporary decree. Plaintiff, in short, while insisting that viewing this as a constitutional suit it has, on the face of the proceedings and in the state of the record, clearly shown that the order was wrong and cannot stand, and that it should have a temporary decree against it, urges further that, looking at it as a statutory suit as well, it is quite plain that a consideration of the equities require a stay pending this proceeding for review.

Whether the Legislature may, in the absence of waste and in the interest alone of eliminating abuses, evils, and injustices which it may be claimed the present "law of capture" entails, taking into consideration by means consistent with due process the vested rights of all owners in a field, provide a substitute for the now prevailing rule, we need not now consider, for it has not, in the statute before us, undertaken to do this.

The statute, House Bill No. 266 (Acts Tex. 1935, c. 120 (Vernon's Ann. Civ. St. Tex. art. 6008), is a comprehensive one, declaring the policy of the state with reference to the conservation of natural gas and the prevention of waste in its production. It classifies gas as sweet and sour, provides the uses to which each kind of gas may be put, authorizes the zoning of a field for the purpose of its regulation and administration, and directs the Commission in the discharge of the duties imposed and powers conferred, and provides penalties. That it is a waste statute only its declaration of policy[1] makes clear. The specific sections in-

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[1]Section 1 (Vernon's Ann. Civ. St. art. 6008, Sec. 1): *Declaration of Policy:* In recognition of past, present, and imminent evils occurring in the production and use of nat-

volved here are sections 10 to 19 (Vernon's Ann. Civ. St. Tex. art. 6008, Sec. 10 to 19).

Section 10 directs the Commission to prorate and regulate the production of gas from each common reservoir, for the protection of public and private interests, (a) in the prevention of "waste" as defined herein; (b) in the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this article. The remaining sections direct when and how the Commission shall discharge the duty imposed and exercise the authority conferred in the matter of regulating and prorating the production of gas "from gas wells to be used for light and fuel purposes to which sweet gas may be put under the terms of this article."

These sections provide for the hearing and determination of waste and market demand and for zoning fields. They designate the limits within which restrictions may be imposed, and generally lay out and prescribe the Commission's course in discharging its agency.

Taking it at the best for defendants' claim of authority to enter the order in question, the statute has undertaken to say no more than that, without reference to waste, where there are wells in a field having no market for their production those who have markets may not take their full needs from their own wells. This is very far from either attempting or accomplishing the repeal of the rule of capture and the substitution for it of another rule of taking consistent with vested rights, fair dealing, and due process. This is merely to say what we have said in the Shutdown Case (*Texoma Natural Gas Co.* v. *Terrell*) 2 F. Supp. 168, supra, could not be justly done, that, "in order to hasten the day when pipe line companies would voluntarily purchase from well owners having no markets," the Commis-

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ural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production.

sion could limit the permissible takings from their wells below their absolute needs.

If, then, as the Commission contends, the Legislature meant to say that, without regard to questions of waste, persons who had provided themselves with markets should, because other wells owners had no markets, be prevented the full use of them, the law would on its face be a class law; unjust and partial; and designed as it would be to take the property of one class to give it to others, would be invalid; a taking of property without due process, a denial of the equal protection of the laws. If, however, as we believe from a reading of the act, the Legislature meant only to provide, as it has for some time been doing in its proration statutes, that, when there was waste attending full actual production from wells having markets, and because thereof it became necessary to restrict that production, this restriction should be so instituted and carried out as to reasonably and equitably protect the rights of all actual producers, that is, those having markets, in the field, the law is valid, and the question arises on the order. We have all along recognized that it is a necessary result from the rule that production may be restricted to prevent waste; that, when restriction is done, it must be done equitably and uniformly over all of those actually producing for the market. *People's Petroleum Co.* v. *Sterling* (D. C.), 60 F. (2d) 1041; *Danciger Oil Co.* v. *Smith* (D.C.), 4 F. Supp. 236; *Amazon Petroleum Corporation* v. *Railroad Commission* (D. C.), 5 F. Supp. 633. The courts of Texas have recognized it; *Danciger Oil Co.* v. *R. R. Comm.* (Tex. Civ. App.), 49 S. W. (2d) 837; *Brown* v. *Humble Oil Co.* (Tex. Sup.), 83 S. W. (2d) 935.

We turn then, to the order, inquiring (1) whether there is any evidence that waste is being, or is about to be, committed by the operations the order is aimed at; (2) whether, if there is, the measures taken by the order have a reasonable relation to its prevention; and (3) whether, in the exercise of a sound discretion, the interlocutory injunction should be granted or denied.

The order creates two zones, the eastern and western. It purports to determine the market demand on the basis

of the needs of those having markets, and then to apportion this demand, not among the wells supplying it, but among those wells and the wells of others having no markets. The basis fixed for the apportionment of the allowable to each well is 50 per cent, on the potential of the well, and 50 per cent on acreage; the acreage factor being taken, not at the number of acres actually owned by each well owner, but at a set figure of 160 acres assumed to be the reasonable drainage area per well.

Plaintiff's affidavits are to the effect that its operations are not now causing, and never have caused, any waste of gas in the reservoir, and that it had not taken, and will for a long time be short of taking, the amount of gas underlying the acreage which it owns. Defendants' affidavits are to the effect that plaintiff's wells have created a low pressure point in the field by large takings there over a period of years, and that, though plaintiff has not taken more gas from the wells than originally underlay all his property, he has taken more gas than originally underlay the wells apportioned under the 160-acre basis fixed by the Commission.

Two of defendants' affidavits are to the effect that the proper way to develop that field would be to drill it closely, so that gas could be taken from wells without undue migration to the point of outlet; that, if all the gas in the field has to travel long distances to get to outlets, much of its pressure will be dissipated and wasted, so that a great deal of it having insufficient pressure for pipe lines use will be left in the ground. They do not show that the field is closely drilled; they do not show how undue migration would be diminished or affected by taking gas which has been coming from plaintiff's wells, from other wells in the same vicinity. Their affidavits contain mere general statements that drawing gas to outlets from a long distance is not the best way to produce the field. The act does not provide for, nor does the order give, protection to any undrilled portion of the field, nor does it take anything into consideration except the wells already drilled, and then only for the purpose of dividing production among them.

The order as originally entered contained no reference to or finding on waste. Later an amended order was filed containing a finding that waste was occurring. There was no provision in either order requiring that plaintiff should take gas from wells having no outlet or providing such wells with an outlet. Though it was contemplated that the effect of the order would be to compel plaintiff to supply its needs by other takings than those allowed from its own wells, nothing in the order compels this. On its face then, since the wells it was designed to benefit have no market outlet, it operates, not as a proration, but simply as a reduction order.

It is plaintiff's position that the finding of waste is wholly without support in the evidence; that nothing more appears than a general conclusion that complete drilling of the field would produce a greater ultimate yield. It insists that, if the finding of waste is supported by the evidence the order the Commission made reducing plaintiff's takings from its wells has no reasonable relation to the prevention of such waste; that it does not provide for either ratable takings or for complete development of the field; it merely operates arbitrarily to reduce plaintiff's takings. It insists, too, that the order is invalid and unreasonable in apportioning the allowable on the basis of the arbitrarily assumed 160 acres instead of on the basis of the actual acreage owned. It argues that these, in connection with all the other facts in the case, conclusively establish that the whole purpose and effect of the order is not to prevent waste, but to divide plaintiff's markets with those who have none,[2] a purpose and effect beyond the sanction of law. It argues especially that, whatever a hearing upon the merits will disclose, and whatever order should be then entered, the equities of the

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[2]A very modernistic application of remedial measures to conditions the old nursery rhyme depicts:

"This little pig went to market,
This little pig stayed at home;
This little pig had roast beef for dinner,
This little pig had none."

case require that pending the hearing on the merits, its injunction be continued in force.

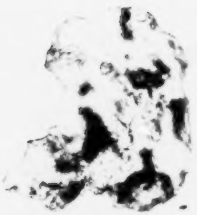
Defendants, relying on the rule of presumptions in favor of the Commission's order and the reluctance which courts feel to restrain the action of state officers purporting to have been taken within the law, insist that the order should not be restrained. They say that plaintiff has taken a foreshortened view of the matter; that, restricting its gaze to its own operations, it has failed to observe the whole scene in the light of which the order must be read—a scene in which plaintiff's operations are but a small part of the whole. The whole, they say, is a condition of wasteful production referred to in detail in *Sneed* v. *Phillips Petroleum Co.* (C.C.A.), 76 F. (2d) 785, which existed in the Panhandle field when under the former law wasteful operations were permitted to be carried on by those who had no markets for their gas for light and fuel. They say that the Legislature, desiring to stop the wasteful uses of the gas, but unwilling to do so without giving the owners of those wells markets for their gas for light and fuel in lieu of the markets for wasteful uses which the new law would deprive them of, enacted the present law as a complete scheme for regulating waste in the field, and authorized the Commission to make the order it did to carry out that scheme. They say too, that, viewed entirely from the standpoint of the plaintiff's operations, there is sufficient evidence to support the findings the Commission made of waste and the order they made as having a reasonable relation to preventing it.

We think it perfectly plain that the fact that the Legislature wished to prohibit the use of gases for wasteful purposes, but was unwilling to do so without supplying well owners with markets for their gas for lawful uses, that is, for light and fuel, would not, if it were a fact, be warrant for a law apportioning to the use of these well owners markets and facilities, the private property of others.

We reject, then, the idea that the Legislature, in order to placate those whose wasteful use of gas it was forbidding, intended to take the facilities and property of others to give it to them. We think it plain that the order cannot stand upon such considerations.

When we consider the Commission's order on the alternative ground put forth to sustain it, that the evidence does not overthrow the presumptions attending the finding that plaintiff's operations were wasteful, and its conclusion that the order had a reasonable relation to preventing it, we are in no doubt that plaintiff should have its injunction. For, whatever the ultimate decision on the merits of this case may be after its full development on the law and the facts, we think it plain, that, as the matter stands on the record now before us, not to grant the relief prayed for would be an abuse of our discretion, not to do so would result either in depriving the public of gas for which it has contracted and on which it relies, or if plaintiff, complying with the order, undertakes to supplement its takings by connecting with wells of others, it will serve to put plaintiff to great and unnecessary expense if the law be found invalid.

At best for defendants, the authority they seek to exert is greatly disputed and doubtful. The evidence before us greatly preponderates against, if it does not wholly overthrow, their claims. The injury from a refusal to grant the injunction is imminent and great; that from granting it pending the early trial of the issues already provided for, slight and remote. Let the interlocutory order issue.



APPENDIX "C".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION.

No. 550. In Equity.

Texoma Natural Gas Company, *Complainant,*

vs.

Ernest O. Thompson, *et al., Defendants.*

Before Hutcheson, Circuit Judge, and Kennerly and McMillan, District Judges.

Per Curiam:

Complainant, owning gas lands in what the Commission has zoned as the West Panhandle Field, complains of the order of the Commission limiting the production from its wells below its market requirements.

While as to the land's owned, the zones occupied, the rock pressures of plaintiff's wells and of those adjoining, the facts in this case differ from those in the case of Texas Panhandle Gas Co. vs. Ernest O. Thompson, et al., this day decided, in so far as material to the decision, the facts in the two cases are the same, the issues and contentions the same.

It will serve no useful purpose then, to write in this case; it will suffice to say that for the reasons given in the opinion in that case, the temporary injunction should be granted.

File. McMillan, Judge.

Endorsed: No. 550. In Equity. Texoma Natural Gas Company, Complainant *vs.* Ernest O. Thompson et al., Defendants. In the District Court of the United States for the Western District of Texas, Austin Division. Opinion of the Court. Filed October 7, 1935. D. H. Hart, Clerk, by T. H. Thompson, Deputy.